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IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Venezuela's petition presents important questions of federal law that divide the circuits, are contrary to Court precedent, violate international law, or all three. None are fact-bound; they arise from facial challenges to subject-matter jurisdiction; and all concern foreign-sovereign immunity under the FSIA. In addition, these pleadings-related questions are presented in the ideal posture: on motions to dismiss. Review should be granted.

ARGUMENT

I. THE PETITION PRESENTS THREE QUESTIONS OF FEDERAL LAW ON WHICH COURTS ARE DIVIDED.

A. The D.C. Circuit Split With Its Sister Circuits By Recognizing A Discrimination Exception To The Domestic-Takings Rule.

1. a. H&P does not dispute that the D.C. Circuit held that an FSIA plaintiff may properly plead a "discriminatory takings" "exception to the domestic[-]takings rule." Pet. App. 13a, 17a. And H&P does not dispute that the Seventh and Ninth Circuits have declined to recognize any such exception. Nonetheless, H&P argues that there is no conflict among the circuits because, like the D.C. Circuit, the Seventh and Ninth Circuits recognize that discriminatory takings *can* be unlawful. Br. in Opp. (BIO) 14-15. Of course they do; that is not the point. The point is that those courts, *un*like the D.C. Circuit, recognize that discriminatory takings violate international law only when a state has taken the property *of a national of another state*.

Here is the Seventh Circuit's language: "[t]he discrimination that concerns [*Restatement (Third) of Foreign Relations Law* § 712 (1987)] is discrimination against aliens, not discrimination among a state's own nationals based on race, religion, ethnicity, or similar grounds, however despicable such discrimination might be." *Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847, 857 (7th Cir.), *cert. denied*, 135 S. Ct. 2817 (2015). And here is the Ninth Circuit's: "expropriation by a sovereign state of the

property of its own nationals does not implicate settled principles of international law," *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) (brackets and quotation marks omitted), even where the expropriation is made with a "discriminatory motivation," *id.* at 712. These decisions cannot be reconciled with the D.C. Circuit's holding that there *is* a "discriminatory takings" "exception to the domestic[-]takings rule." Pet. App. 13a, 17a. *Cf.* Pet. App. 33a (Sentelle, J., dissenting) ("I would * * * conclude that Venezuela's reliance on the domestic takings rule is well taken").

b. H&P's other purported distinctions also fail. H&P claims that the Seventh Circuit's rejection of a discrimination exception to the domestic-takings rule in *Fischer* was "dicta." BIO 14. It was not. In *Fischer*, the Seventh Circuit affirmed dismissal because the plaintiffs failed to exhaust domestic remedies on their genocide-based expropriation claims. *See* 777 F.3d at 872. But to do so, it first had to reject the plaintiffs' argument that they did not need to exhaust domestic remedies because "a separate basis supported finding violations of international law: that the takings were 'discriminatory.'" *Id.* at 857 That holding was essential to the decision.

As for the Ninth Circuit, H&P offers the novel argument that *Siderman* is distinguishable because of the *basis* of discrimination at issue: ethnicity in *Siderman*, versus alienage here. Neither the Ninth Circuit nor the court below drew that distinction, however, because it does not exist. In fact, far from *distinguishing* discrimination based on "ethnicity" from discrimination based on "alienage," the Ninth Circuit treated the two as equivalent. When ruling that the *non-Argentinian* plaintiff's takings claim

could proceed, it quoted the Restatement's language on alienage-based discrimination to support its conclusion that the non-Argentinian plaintiff had properly pleaded an unlawful taking due to Argentina's "discriminatory motivation based on ethnicity." *Siderman*, 965 F.2d at 712.

2. H&P's remaining arguments go to the merits. Briefly, H&P misreads the Restatements. The *Restatement (Second)* recognizes the undisputed—and irrelevant—proposition that when a state nationalizes the *legal corporate entity*, shareholders' independent rights in their shares are destroyed, so the taking, if discriminatory, may violate international law with respect to foreign shareholders. *See Restatement (Second) of Foreign Relations Law* § 172 cmt. d, illus. 3 (1965) ("domestic corporations owned by aliens" nationalized). And the *Restatement (Third)* cites *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), and *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d Cir. 1967), only as examples of discriminatory *animus*. *See Restatement (Third)* § 712 reporter's n.5. The *Restatement (Third)* does not endorse a discrimination *exception* to the domestic-takings rule; to the contrary, Section 712 affirms that a discriminatory taking violates international law only if a state takes the property of the national of another state. Pet. 12.

In any event, none of these authorities detracts from the ICJ's authoritative position that domestic corporations "have no remedy in international law" against their state of incorporation, even in cases where foreign shareholders claim "discriminatory" treatment by the expropriating state. *Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belgium* v. *Spain)*, 1970 I.C.J. 3, 17 § I, 44

¶ 78 (Feb. 5, 1970). *Barcelona Traction* reflects international law at the time of the FSIA's enactment, and the court below erred in disregarding it.[1]

B. The D.C. Circuit Impermissibly Recognized Shareholder Property Rights In Corporate Assets.

The D.C. Circuit also held that the expropriation exception allows a shareholder to plead rights in an existing corporation's assets. This holding is contrary to established corporate-law principles, which apply to the FSIA as shown in *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003); it is contrary to international law, as set forth in *Barcelona Traction*; and it is not saved by *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007), or *Franchise Tax Bd. of Cal.* v *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990).

1. a. The decision below conflicts with *Dole Food* because it disregards half of the opinion. The panel ignored (and contradicted) *Dole Food*'s application of the fundamental rule of statutory construction—that common-law principles apply unless a statute ex-

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[1] H&P contends *Barcelona Traction* "did not involve a taking." BIO 15. Incorrect. Spain "seiz[ed] the assets" of a corporation owned by Belgian shareholders. *Barcelona Traction*, 1970 I.C.J. at 8-9 ¶ 13. Although *Barcelona Traction* arose in the context of diplomatic protection, the ICJ also discussed customary international law—what Venezuela cites in its petition and this reply. The same cannot be said for H&P's discussion of the hypothetical possibility of diplomatic protection by a shareholder's state. *See* BIO 16. That possibility is peculiar to diplomatic protection (as H&P's own description makes clear), and in any event, the ICJ declined to pass on the validity of that theory. *Barcelona Traction*, 1970 I.C.J. at 48 ¶ 92.

pressly abrogates them—to the FSIA. *See* 538 U.S. at 475-476. *Compare* Pet. App. 18a-19a; *with* Pet. App. 33a (Sentelle, J., dissenting) ("I differ with the majority's apparent belief that Venezuela's reliance upon *Dole Food* * * * is misplaced.").

H&P's response doubles down on the majority's error, arguing that corporate law is not part of the FSIA because it has not been expressly incorporated. Pet. App. 18a-19a; BIO 18-19. That is wrong, for the reasons that Venezuela has already offered. Pet. 19-21. Review should be granted to bring the D.C. Circuit in line with this Court's precedent.

b. H&P presses on by hedging on the merits and claiming that even if corporate law applies, the court below was correct, because corporate law recognizes shareholder rights in corporate property. H&P cites authorities supposedly in support of that proposition, but omits their context: all concern the *internal* affairs of a corporation, and shareholder rights with respect to management, or other shareholders. BIO 19, 21. None discusses shareholders' rights with respect to a third party's injury to corporate property. In that context, the law is clear: "when a third party injures a corporation," the shareholders' "claims are generally derivative rather than direct, and therefore they are not the real party in interest." *Labovitz* v. *Washington Times Corp.*, 172 F.3d 897, 902 (D.C. Cir. 1999) (quotation marks omitted).

2. In addition, as the petition made clear, the expropriation exception requires an FSIA plaintiff to plead that its property rights were taken in violation of international law; and under international law, H&P-IDC's property rights are not at stake. The

court below failed to account for, and acted contrary to, international law for H&P-IDC's claim. Pet. 24.

H&P offers no meaningful rebuttal. Its response is limited to a footnote that addresses only *Barcelona Traction*'s observation that municipal law determines the legal status of corporations and their shareholders. *See* BIO 21 n.7 It fails to mention that when, as here, municipal law recognizes the separate legal status of a corporation and its shareholders, that separation has consequences under *international* law: Shareholders do not have rights in corporate property while the corporation exists. *See Barcelona Traction*, 1970 I.C.J. at 35 ¶ 44, 38 ¶ 52, 41 ¶ 66; Submission of United States 1-3 ¶¶ 4-9, *International Thunderbird Gaming Corp.* v. *United Mexican States*, UNCITRAL case (May 21, 2004), *available at* http://goo.gl/5sKZ6f.

3. H&P instead retreats to *Permanent Mission*. Yet, as Venezuela's petition explained, the majority below departed from the Court's decision in that case by allowing H&P-IDC to claim property rights in its subsidiary's assets without identifying any direct source of those rights (such as ownership, possession, or contract). Pet. 22-24. H&P does not dispute Venezuela's description of *Permanent Mission*; rather, it quibbles with Venezuela's statement that the majority misread *Permanent Mission* to deem the source of property rights irrelevant. BIO 21. But here is the majority's language: "the FSIA's expropriation exception focuses *** *broadly* on rights in property, *Permanent Mission*, 551 U.S. at 198 (emphasis added), and its text imposes no limitation on the source of those rights." Pet. App. 22a (quotation marks omitted). If there is "no limitation" on the "source" of property rights under the FSIA, the source of those

rights is irrelevant. Venezuela's description is correct, and H&P's efforts to rewrite the majority's language make clear the majority's error.[2]

4. H&P also attempts to reconcile the decision below with this Court's precedent by citing *Franchise Tax Board*'s rule that "a shareholder with a direct, personal interest in a cause of action [may] bring suit even if the corporation's rights are also implicated." 493 U.S. at 336. According to H&P-IDC, it suffered a direct and personal injury in the form of the loss of control over H&P-V, due to the fact that all of H&P-V's assets were taken. BIO 20. That injury, however, is based entirely on its position as the parent corporation of H&P-V. (Indeed, H&P-IDC's damages claim for the loss of the expropriated oil rigs is *identical* to H&P-V's.) And that is precisely what *Franchise Tax Board* said was *not* a direct and personal injury. A shareholder must "have suffered direct injuries independent of their status as shareholders."

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[2] The majority implied an (unidentified) source of shareholder rights in corporate property by citing its precedent under the Due Process Clause. *See* Pet. App. 19a-22a (discussing *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated*, 471 U.S. 1113 (1985)). That reasoning is flawed many times over. The Due Process Clause does not *create* property rights. The U.S. Constitution cannot create rights *against a foreign state*. The *Ramirez* judgment was vacated, yet the court of appeals gave *Ramirez* "precedential weight." Pet. App. 21a (quotation marks omitted). And *Ramirez* "effectively supplants * * * the general principle of corporate law that only management, or the shareholders by derivative actions with all the accompanying safeguards, may sue regarding injury to corporate assets." 745 F.2d at 1558 (Scalia, J., dissenting). Not to mention, the majority's resurrection of *Ramirez* reaches beyond the expropriation exception to claims against the United States. *See id.*

493 U.S. at 336-337 When the injury passes through the company to reach the shareholder, it is merely derivative. *See id.* at 337; *see also, e.g.*, *Labovitz*, 172 F.3d at 902-904.

More to the point, the majority below did not hold H&P-IDC had suffered a direct and personal injury. Rather, it established a rule in the D.C. Circuit that, under the expropriation exception, a shareholder properly pleads property rights in corporate assets taken by a foreign state. *Franchise Tax Board* thus does not make the second question presented any less worthy of this Court's review.

C. There Is A Circuit Split Over The Standard Of Review For Expropriation-Exception Jurisdictional Pleadings.

Finally, H&P cannot disguise the existence of a circuit split regarding the standard of review for jurisdictional pleadings under the expropriation exception. The D.C. and Ninth Circuits will grant a jurisdictional dismissal of an expropriation-exception claim based on legal inadequacy only if the claim is wholly frivolous. Pet. App. 11a-12a (applying the federal-question jurisdictional-pleading standard of *Bell* v. *Hood*, 327 U.S. 678 (1946)). The Second, Seventh, Eighth, and Eleventh Circuits apply a more demanding standard of review *See* Pet. 26-32.

1. H&P's response is that there is no conflict because the Second, Seventh, Eighth, and Eleventh Circuits have not expressly rejected *Bell*'s application to the FSIA (or because they cited *Bell* somewhere, no matter for what proposition). BIO 22-26. But these Circuits had no need to reject *Bell*. *Bell* established the pleading standard for "[a] claim invoking federal-question jurisdiction under 28 U.S.C.

§ 1331." *Arbaugh* v *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006). A claim invoking jurisdiction under the FSIA is not that, and this Court has never applied *Bell* to the FSIA.

More importantly, H&P does not seriously dispute that these Circuits *in fact* applied a standard more demanding than *Bell* to expropriation-exception jurisdictional pleadings. That establishes the circuit split.

2. H&P argues that, in any event, the court below was correct in its decision to extend *Bell* to the FSIA. This is not an argument directly bearing on the propriety of certiorari review Nevertheless, H&P is wrong, as jurisprudence in the analogous context of the Alien Tort Statute (ATS), 28 U.S.C. § 1350, demonstrates. When asked to address the question, courts have declined to apply *Bell* to ATS pleadings, reasoning that the ATS demands "a more searching preliminary review of the merits than is required, for example, under the more flexible 'arising under' formulation." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). The same rule should apply to the FSIA, a similarly worded jurisdictional statute that also implicates important matters of foreign policy. *See* Pet. 32.[3]

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[3] Venezuela did not "embrace" *Bell*. BIO 22. Rather, it cited binding Circuit precedent before the panel, and then challenged that precedent in its petition for rehearing en banc. In any event, the panel certainly passed on the appropriate pleading standard in its decision. Pet. App. 11a-12a.

II. THE PETITION PRESENTS VITALLY IMPORTANT, RECURRING QUESTIONS, AND THIS CASE IS THE RIGHT VEHICLE TO RESOLVE THEM.

1. The decision below has far-reaching implications for FSIA litigation. Under the generous pleading rules adopted by the court below, many more plaintiffs are likely to file in D.C. because their complaint will survive dismissal so long as it is not wholly frivolous. *See* 28 U.S.C. § 1391(f)(4) (any FSIA claim against foreign state or its political subdivision may be brought in D.C. federal court). As a matter of course, then, foreign states will now be subject to "the burdens of litigation," including "jurisdictional discovery," on the paltriest of allegations. *In re Papandreou*, 139 F.3d 247, 251, 254 (D.C. Cir. 1998) (quotation marks omitted), *superseded by statute on other grounds*. *See* Pet. 33-35.

H&P, which filed its own certiorari petition in this case on a different issue, does not dispute these implications. Instead, it claims—without authority—that the circumstances of this case are uncommon. *See* BIO 27-28. The U.S. Department of State has recognized otherwise: "Investors often choose to make an investment through a separate legal entity, such as a corporation, incorporated in the host State," and, as a result of that choice, it is "a *common situation*" that the corporation and its investors are "left without a remedy under customary international law." Submission of United States 3-4 ¶¶ 10-11, *GAMI Invs., Inc.* v. *United Mexican States*, UNCITRAL case (June 30, 2003) (emphasis added), *available at* http://goo.gl/AlUR70.

H&P also challenges the importance of uniformity in the law under the FSIA's expropriation exception and suggests that this Court's jurisprudence is primarily concerned with the expectations of "U.S. nationals." BIO 29. Wrong. The purpose of the FSIA is to ensure "a uniform body of law in this area" "in view of the potential sensitivity of actions against foreign states." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (brackets and quotation marks omitted).

2. This petition is the right vehicle to decide the questions presented. All three questions were passed on by the panel. The majority and dissenting opinions offer reasoned analyses for their disagreeing positions. And because the court refused to rehear the case en banc, that law is likely to remain uncorrected absent this Court's intervention.

H&P's alternative argument on the supposed correctness of the result reached on the discriminatory-takings claim does not change that fact. H&P-V likens itself to victims of the Holocaust stripped of *all* rights of citizenship and contends that because Venezuela treats H&P-V as foreign company in certain contexts, H&P-V in fact is not a national of Venezuela. BIO 30-31. No court has accepted H&P-V's argument. Moreover, it is irrelevant. The decision below establishes, as the law of the D.C. Circuit, a discriminatory-takings exception to the domestic-takings rule. Whatever alternative arguments that H&P-V might avail itself of on remand have no bearing on the cert-worthiness of this question.

3. Finally, the case is in the right posture to decide the presented pleadings-related questions. Like the similar cases of *OBB Personenverkehr AG* v. *Sachs*,

136 S. Ct. 390 (2015) (FSIA's commercial-activities exception), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009) (Rule 8(a) pleading requirements), this petition arises from a lower court's refusal to dismiss the complaint on immunity grounds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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